Pepsi Bottling Group, Inc. and New England Joint Board, R.W.D.S.U., AFL–CIO, Local Union No. 513. Case 1–CA–38036

April 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On June 15, 2001, Administrative Law Judge Richard H. Beddow issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

This case involves employees in two bargaining units: one at the Respondent's Allston, Massachusetts facility, and one at its Cranston, Rhode Island facility. The Union represents the employees in both units. The judge found that the Respondent, in violation of Section 8(a)(5) and (1), unilaterally changed the Allston and Cranston unit employees' terms and conditions of employment by implementing a new 401(k) matching contribution for the Respondent's unrepresented employees without giving the Union notice and opportunity to bargain for this benefit as to the unit employees. For the reasons stated below, we reverse and dismiss the complaint.

I. FACTS

A. Allston and Cranston Collective-Bargaining Agreements

The Respondent produces, distributes, and sells packaged beverages. The Respondent was a division of PepsiCo, Inc. until April 1, 1999, when the Respondent spun off from PepsiCo.

The Union represents the Respondent's warehousemen, mechanics, drivers, and helpers at its Allston facility. Employees in the Allston unit are covered by a collective-bargaining agreement in effect from June 1, 1999, through May 31, 2002 (1999 Allston Agreement). The 1999 Allston Agreement was reached in late May 1999 and ratified by the union membership shortly thereafter. It replaced a prior agreement that was in effect from June 1, 1995, through May 31, 1999 (1995 Allston Agreement).

The Union also represents the Respondent's production workers, warehouse workers, mechanics, and drivers at its Cranston facility. Employees in the Cranston unit are covered by a collective-bargaining agreement in effect from May 1, 1999 through April 30, 2003 (1999 Cranston Agreement). The 1999 Cranston Agreement was reached in late April and ratified by the union membership shortly thereafter. It replaced a prior agreement in effect from May 1, 1995 through April 30, 1999 (1995 Cranston Agreement).

B. The Respondent's Benefits Plans

The Respondent offers a number of different benefits plans. Greg Heaslip, the Respondent's director of benefits, testified that the Respondent has a "Benefits Plus" Plan informally known as the "Flexible Benefits Plan." Benefits Plus is a cafeteria-style plan that allows employees to choose from among different benefits options. According to an April 1999 Benefits Plus Plan document, the component plans of Benefits Plus are certain health insurance, accident insurance, and disability plans. The Respondent also offered a 401(k) plan, but the Benefits Plus Plan document does not list the 401(k) plan as a component plan of Benefits Plus. The Respondent's health, accident, and disability plans, as well as its 401(k) plan and various other benefits, are summarized in the Respondent's 1999 and 2000 "benefits books," which the Respondent distributed to its employees.

Both the 1999 Cranston Agreement and the 1999 Allston Agreement address benefits. The 1999 Cranston Agreement provides in relevant part: "Effective January 1, 1996, the Company shall implement the Flexible Benefits Plan as described in negotiations including the '401(k)' plan." The 1999 Allston Agreement provides in relevant part: "Effective January 1, 1996, all eligible employees shall be covered under the Company's Flexible Benefits Plan as described during negotiations." Each of these provisions also appeared verbatim in the preceding 1995 agreement.

C. The 401(k) Matching Contribution

Prior to the April 1 spinoff, the Respondent's employees participated in a PepsiCo stock option program, but the program was discontinued because of the spinoff.[1] Shortly after the spinoff, the Respondent began evaluating options for employee ownership of the Respondent's stock. The Respondent decided to recommend a 401(k) matching program under which the Respondent's matching contributions would be paid in the Respondent's stock. The Respondent's board of directors approved the matching program in October 1999. In a December 1999 letter, the Respondent notified employees of the new

[1] The General Counsel does not allege that discontinuance of the stock option program was unlawful.

401(k) match, which would take effect in January 2000. The letter stated in part:

> All non-union employees with at least one year of service will automatically be eligible for the match beginning in January. For our union employees, we hope to be able to extend this benefit to you in the future, subject to negotiations between PBG and your union.

There is no evidence in the record that the Union ever requested bargaining over obtaining the 401(k) match for Allston and Cranston unit employees.

II. PROCEDURAL BACKGROUND AND JUDGE'S DECISION

The complaint alleges in substance that the Respondent unlawfully modified the 1999 Allston and Cranston Agreements in violation of Section 8(d) and 8(a)(5) of the Act. Specifically, the complaint alleges that the Respondent "failed to continue in effect all the terms and conditions" of the Allston and Cranston collective-bargaining agreements by "failing and refusing to apply the PBG Matching Contribution Provision of the PBG 401(k) Plan Provision of the Respondent's flexible benefits plan."

At the hearing, counsel for the General Counsel called no witnesses, but introduced several documents, including the 1995 and 1999 Allston and Cranston Agreements and the Respondent's benefits books. The Respondent called two witnesses: Greg Heaslip, its director of benefits, and Christopher Luman, its former senior labor relations manager. Heaslip testified about the implementation of the matching contribution, and Luman testified generally about the timing of negotiations of the 1999 Cranston and Allston Agreements. Neither the testimony nor the documents included any evidence about what the parties discussed during negotiations for the 1995 or 1999 Allston or Cranston Agreements or what the parties intended the provisions of those agreements regarding the 401(k) plan and Flexible Benefit Plan to mean.

The judge found that Respondent violated Section 8(a)(5) and (1), but not on the basis alleged in the complaint. Rather, based on his reading of the 1999 Allston and Cranston Agreements, the judge found that the Respondent unilaterally changed terms and conditions of employment "by changing unit employees' rights to participate in the 401(k) provisions of the Employer's Flexible Benefits Plan without giving the Union notice and the opportunity to bargain." Accordingly, the judge found that the Respondent violated Section 8(a)(5) and (1).

III. ANALYSIS

We find that the complaint must be dismissed. First, we find that the violation found by the judge—that the Respondent unilaterally changed unit employees' terms and conditions of employment—was not alleged in the complaint or litigated at the hearing. Second, we find that the General Counsel failed to prove the violation alleged in the complaint, that the Respondent failed to continue in effect all the terms of the Allston and Cranston collective-bargaining agreements.

A. Unilateral Change Without Notice and Opportunity to Bargain was not Alleged or Litigated

As stated above, the judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing terms and conditions of employment without notice to the Union and an opportunity to bargain. We disagree.

The unilateral change violation found by the judge was neither alleged nor litigated. The violation alleged in the complaint and litigated by the parties was the repudiation of a contractual obligation to provide the 401(k) matching contribution to unit employees. "It is well established that a violation of the Act cannot be properly found where the violation was not alleged in the complaint and the issue was not fully litigated at the hearing." *Liquor Industry Bargaining Group*, 333 NLRB 1219, 1223 (2001), enfd. 50 Fed. Appx. 444 (D.C. Cir. 2002) Accordingly, we reverse the judge's finding that the Respondent unilaterally changed employee terms and conditions of employment in violation of Section 8(a)(5) and (1).

Under Board precedent, an employer may not provide a new benefit to unrepresented employees and then refuse to bargain with the Union about providing the benefit to represented employees. See, e.g., *Empire Pacific Industries*, 257 NLRB 1425 (1981). However, the complaint does not allege, and the parties did not litigate, such a violation.[2] Therefore, a violation of the Act cannot be found under the principles outlined in *Empire Pacific*, supra.

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[2] We note that the judge's decision erroneously suggests that the parties litigated the issues of whether the Union requested bargaining over providing the 401(k) match to the Allston and Cranston unit employees and whether the Respondent refused to bargain over the matching contribution. Thus, in sec. II of his decision, in discussing the Respondent's implementation of the 401(k) match, the judge found as follows:

> The Union then protested this exclusion of its members from the 401(k) matching contribution portion of the Benefits Plan. In March 2000, the Union and Respondent met in an unsuccessful attempt to resolve the matter and the Respondent adhered to its position that it would not include the unit employees in the 401(k) matching contribution portion as part of the Benefits Plan.

Although these statements appear in the General Counsel's posthearing brief, we find no record support for them.

Likewise, in the section of his decision entitled "Discussion," the judge stated that an employer may not provide a benefit to nonunion employees while "simultaneously precluding the bargaining representative from negotiating on that issue." The record does not show, however, that the Respondent precluded the Union from bargaining over the matching contribution.

B. Contractual Entitlement to 401(k) Match was not Proven

We further find that the General Counsel failed to prove the violation alleged in the complaint and litigated by the parties. The complaint alleges that the Respondent "failed to continue in effect all the terms and conditions" of the Allston and Cranston collective-bargaining agreements by "failing and refusing to apply the PBG Matching Contribution Provision of the PBG 401(k) Plan Provision of the Respondent's flexible benefits plan," thereby violating Section 8(a)(5) and (1). As explained below, we find that the Cranston and Allston Agreements are ambiguous. Because there is no extrinsic evidence in the record showing the parties' intent, we find that the General Counsel failed to prove that entitlement to the 401(k) matching contribution was a term or condition of either the 1999 Cranston Agreement or the 1999 Allston Agreement. Therefore, we conclude that he failed to prove that the Respondent violated Section 8(a)(5) and (1) by failing to continue in effect all the terms of these agreements.

1. Cranston Agreement

The 1995 and 1999 Cranston Agreements state: "Effective January 1, 1996, the Company shall implement the Flexible Benefits Plan as described in negotiations including the '401(k)' plan." We find this provision ambiguous as to the 401(k) benefits required for Cranston unit employees, and there is no evidence in the record that explains what the parties intended by this term. The 1995 and 1999 Cranston Agreements, which were negotiated before the 401(k) match existed, of course do not expressly provide for participation in a 401(k) match. There is no evidence of what took place during negotiations for either agreement. The 1995 and 1999 Cranston Agreements require only that the Respondent implement "the '401(k)' plan" as of January 1, 1996, and reference discussions during negotiations. To find that the Cranston employees are entitled to participate in the 401(k) match implemented in 2000, we would have to conclude (1) that the term "as described in negotiations" does not limit Cranston unit employees to the 401(k) benefits extant at the time of those negotiations and (2) that the Agreement means that Cranston unit employees would participate not only in "the '401(k)' plan" the Respondent was required to implement as of January 1, 1996, but also in a new, later 401(k) benefit that did not exist at the time the agreement was negotiated. If anything, the language of the 1999 Cranston Agreement suggests otherwise—that the Respondent was required to implement a particular plan as of January 1996, which undisputedly did not include a matching contribution at that time.

Of course, it is possible that the parties discussed the 401(k) plan during negotiations and agreed that, in the future, the Respondent would implement for unit employees whatever new 401(k) benefits it implemented for nonunion employees. As of January 2000, those benefits would include a matching contribution. It is also possible that the phrase "as described in negotiations" simply recognizes that the Flexible Benefits Plan and 401(k) plan were discussed in negotiations, but is not intended to alter or limit benefits in any way. There is no evidence in the record, however, to prove that either of these explanations, or any other explanation, is correct. Accordingly, we cannot find that the 1999 Cranston Agreement entitled unit employees to the 401(k) matching contribution, and we cannot conclude that the Respondent violated the Act by failing to continue in effect the terms of the Cranston Agreement.

2. Allston Agreement

The 1999 Allston Agreement states: "Effective January 1, 1996, all eligible employees shall be covered under the Company's Flexible Benefits Plan as described during negotiations." As with the Cranston Agreement, we find this provision ambiguous as to the 401(k) benefits required for Allston unit employees.

The agreement does not even mention a 401(k) plan. The judge appeared to read an entitlement to 401(k) benefits into this provision by finding that the Respondent's 401(k) plan was part of the Flexible Benefits Plan. We disagree that the record evidence proves this.[3] Even assuming it did, however, a finding that the 401(k) plan was part of the Flexible Benefits Plan would not prove that the Allston employees were entitled to the matching contribution. The Allston Agreement provides only that employees are covered under the Flexible Benefits Plan

[3] Although the similar provision in the Cranston Agreement, quoted above, suggests that the 401(k) plan is part of the Flexible Benefits Plan, Greg Heaslip, the Respondent's director of benefits, testified that it was not. He testified that the formal name for the Flexible Benefits Plan was "Benefits Plus." The April 6, 1999 Benefits Plus Plan document introduced into evidence makes no reference to the 401(k) plan. The judge found that the 401(k) plan was part of the Flexible Benefits Plan, apparently because the eligibility provisions in the July 1999 401(k) plan document contain a general statement that employees eligible for Benefits Plus are also eligible for the 401(k) plan. The 401(k) plan document then qualifies this statement, however, by listing certain categories of employees who are eligible for the 401(k) plan but not for Benefits Plus, and vice versa. That is, eligibility for the 401(k) plan is not necessarily coextensive with eligibility for Benefits Plus. To the extent that the judge also relied on the inclusion of the 401(k) plan in the 1999 and 2000 benefits books as proof that the 401(k) plan was part of Benefits Plus, we disagree. The benefits books are compilations of summaries of numerous different benefit plans, some of which are part of Benefits Plus, and some of which are not. Therefore, we cannot conclude that the evidence proves that the 401(k) plan was part of the Flexible Benefits Plan.

"as described in negotiations." As with the Cranston Agreement, there is no evidence of what took place during negotiations or what the parties intended this term to mean. "As described during negotiations" could simply be descriptive, a recognition that the parties did discuss the Flexible Benefits Plan during negotiations. It could, however, be limiting, meaning that unit employees are entitled to participate in the Flexible Benefits Plan only to the extent described during negotiations. Accordingly, we cannot find that the Allston Agreement entitled unit employees to the 401(k) matching contribution.

Therefore, with respect to the 1999 Cranston and Allston Agreements, we find that the evidence does not prove that the Respondent violated Section 8(a)(5) and (1) as alleged in the complaint. Accordingly, we dismiss the complaint.

ORDER

The complaint is dismissed.

Michael Fitzsimmons, Esq., for the General Counsel.
Richard R. Boisseau, Esq., of Atlanta, Georgia, for the Respondent.
Christina D. Duddy, Esq., of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW, Administrative Law Judge. This matter was heard in Boston, Massachusetts, on April 10, 2001. Subsequent to an extension in the filing date. Briefs were filed by the General Counsel and the Respondent (the Charging Party by letter dated May 22, 2001, adopted the brief filed by the General Counsel). The proceeding is based upon a charge filed March 31, 2000,[1] by New England Joint Board R.W.P.S.U., AFL–CIO, Local Union No. 513. The Regional Director's complaint dated November 27, 2000, alleges that Respondent Pepsi Bottling Group, Inc. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by failing and refusing to apply the matching contribution provision of its 401(k) plan provision of its Flexible Benefits Plan to the Charging Party's Allston and Cranston bargaining units.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the production, distribution, and sale of packaged beverages at Allston, Massachusetts, and Cranston, Rhode Island, and it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside Massachusetts and Rhode Island. It admits that it is an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act and it also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Prior to April 1, 1999, the entity that is now Pepsi Bottling Group, Inc. (PBG) existed as The Pepsi-Cola Company, which was a division of PepsiCo, Inc. As a division of PepsiCo, the Pepsi-Cola Company provided certain of its employees with benefits under various PepsiCo benefit plans. Among these benefits was the PepsiCo Flexible Benefits Plan (also known as Flex or Benefits Plus), which was a cafeteria-style plan that allowed employees to chose from among different options of insurance benefits to suit their particular needs.

The PepsiCo Flexible Benefits Plan, 401(k) plan (as well as a stock option plan) were described for employees in a unified summary plan description called the benefits book. The 1999 benefits book for The Pepsi-Cola Company indicated that unionized employees were eligible for participation in the 401(k) plan if they were covered by a collective-bargaining agreement that provided for participation in that benefit but it has no company-match provision calling for employer contributions to employees' 401(k) accounts.

Since at least 1995, the Union has represented employees in the Cranston unit and the Allston unit. Similar but separate collective-bargaining agreements (the "1995 Cranston Contract" and the "1995 Allston Contract") were in effect at each facility from 1995 until spring 1999. The Allston agreement covers a unit of approximately 60 warehousemen, mechanics, drivers, and helpers employed at the Allston facility and is in effect from June 1, 1999, to May 31, 2002. This agreement follows an agreement that was effective from June 1, 1995, to May 31, 1999. The Cranston agreement covers a unit of approximately 140 production workers, warehouse workers, mechanics, and drivers employed at the Cranston facility and is in effect from May 1, 1999, to April 30, 2003. This agreement follows an agreement that was effective from May 1, 1995, to August 30, 1999.

The 1995 Allston agreement incorporated the Respondent's Flexible Benefits Plan as follows:

> Effective January 1, 1996, all eligible employees shall be covered under the Company's Flexible Benefits Plan, as described during negotiations.

The 1995 Cranston agreement also incorporated the Benefits Plan as follows:

> Effective January 1, 1996, the Company shall implement The Flexible Benefits Plan as described in negotiations, including the 401(k) plan.

The Union and Respondent entered into the existing agreement for the Cranston unit on May 1, 1999. The reference to the inclusion of the Benefit Plan was unchanged from the preceding agreement. The Union and Respondent entered into the existing agreement for the Allston unit, dated June 1, 1999, also reference to the inclusion of the Benefit Plan and was unchanged from the preceding agreement.

[1] All following dates will be in 1999 unless otherwise indicated.

The January 1, 1999 benefits book distributed to the Allston and Cranston unit employees is approximately 200 pages in length and covers health care, life and accident insurance, disability protection, and future financial security, including Respondent's save up 401(k) savings plan which provides employees with the opportunity of making tax deferred contributions.

After the spinoff of PBG from PepsiCo, Inc. on April 1, 1999, PBG employees could not participate in the PepsiCo stock option program and in mid May Kevin Cox, the head of human resources at PBG, assigned the development of such a program for PBG to Greg Heaslip, the director of benefits.

At subsequent meetings of managers other options were proposed and discussed and at the end of August a senior management team decided to recommend a 401(k) company match program, pursuant to which the Company's matching contributions would be paid in PBG stock. The recommended program was submitted to the PBG board of directors, which approved it in the middle of October.

The 401(k) company match program was kept confidential until it was approved by the board of directors, assertedly so as not to create unfounded expectations among employees. In the second half of October PBG communicated the new benefit to its human resources managers and in December the Respondent announced the 401(k) company match benefit in a letter to all employees. This letter stated that eligible nonunion employees would be covered by the 401(k) company match program beginning in January 2000 and that the Company hoped to be able to extend the benefit to union represented employees in the future "subject to negotiations between PBG and your union."

The Respondent also issued a 2000 edition of the benefits book, which did not contain any mention of the 401(k) company match program, however, the PBG 401(k) plan was summarized. The 2000 benefits book briefly identified which employees were eligible for participation in the PBG 401(k) plan and stated that "certain union employees" may participate in the plan.

The notification indicated that, effective January 1, 2000, it was providing a 401(k) matching contribution as part of the Benefit Plan. This new portion of the Benefit Plan provided for a 50-percent matching contribution for up to 4 percent of salary for employees with less than 10 years of service and a 100-percent match for up to 4 percent of salary for those with more than 10 years service. The announcement also stated that employees covered by a collective-bargaining agreement (such as those in the Allston and Cranston units), were not eligible for the benefit unless and until it was specifically agreed to by Respondent in collective bargaining.

Thereafter, the 401(k) company match program benefit was described in a Prospectus dated March 15, 2000, which described the eligibility of employees for participation in the 401(k) plan generally and the eligibility of employees for the company match provision. With respect to participation in the plan generally, the Prospectus indicated that any employee whose conditions of employment were determined by collective bargaining with a union was eligible to participate in the plan if inclusion in the plan had been specifically provided for in the applicable collective-bargaining agreement and with respect to eligibility for the company match benefit, the Prospectus indicated that any employee whose conditions of employment were determined by collective bargaining with a union was eligible for the matching contributions if the employee's right to the company match had been specifically provided for in the applicable collective-bargaining agreement.

The Union then protested this exclusion of its members from the 401(k) matching contribution portion of the Benefits Plan. In March 2000, the Union and Respondent met in an unsuccessful attempt to resolve the matter and the Respondent adhered to its position that it would not include the unit employees in the 401(k) matching contribution portion as part of the Benefits Plan. Thereafter, in May 2000, the Respondent benefits director sent all employees a letter with enclosures including the 401(k) plan prospectus. The Respondent notes that because the PBG 401(k) plan gave employees the opportunity to make investment decisions, PBG was required by law to prepare a Prospectus and submit it to all employees who were eligible to participate in that plan.

Discussion

Once a union has been selected to represent an appropriate unit of employees, the employer may not make decisions regarding any term and condition of employment without first notifying the union and providing with the opportunity to bargain and it will be found in violation of Section 8(a)(1) and (5) of the Act by unilaterally implementing changes in a mandatory subject of bargaining such as reducing matching contributions to an employees' 401(k) retirement plan, see *Britt Metal Processing, Inc.*, 322 NLRB 421 (1996), or eliminating a bonus program or other earning opportunities, see *Frank Leta Honda*, 321 NLRB 482 (1996).

It is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees. See *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 fn. 15 (1967). Here, the damage to the Union's authority as bargaining representative is highlighted by Benefits Manager Heaslip's May 2000, letter to employees which encouraged employees to read through enclosed materials to learn about the plan while at the same time, precluding unit employees from the chance to participate and telling them (in the prospectus), that it was because it was not included in the Union's bargaining agreement.

Here, the terms and conditions of employment in the existing collective-bargaining agreements stated that Allston unit plant employees "shall be covered under the Company's Flexible Benefits Plan, as described during negotiations" and that the Company shall implement the Flexible Benefits Plan as described in negotiation, including the 401(k) plan." The Benefit Plan described in the prior benefits book distributed to all employees including an unchanged 401(k) savings plan that did not provide for any matching company contributions.

Here, I conclude that the language of the applicable 1995 and 1999 agreements means that the Allston and Cranston unit employees would participate in the same flexible benefit plan generally available to other employees. Thus, when the Respondent's unilateral introduced an employer contribution 401(k)

plan and refusal to extend this contribution benefit to employees of the Allston and Cranston units, it represented a material change in the terms of the existing contractual agreements. There was no notification to the Union of these changes and there was no offer of an opportunity to bargain over the changes. Otherwise the fact that that changes did not directly diminish any existing company contribution as in the *Britt* case, supra, does not negate the Respondent's failure to take those steps.

As pointed out by the Respondent, the General Counsel did not present any witnesses to elaborate on the contract phrase "as described during negotiations." Clearly, there is no contention that the past negotiations described any plan company contributions to a 401(k) plan and any such evidence regarding benefits in general would not be relevant and would not alter the corroborative description of benefits including the Flexible Benefits Plan listed in past annual benefits books, which included the relevant employee paid 401(k) plan only. Under these circumstances, the General Counsel is not required to show, as suggested by the Respondent, that the Company was contractually obligated to provide unit employees with a company match 401(k) benefit plan. The issue here is the unilateral and disparate implementation of benefit changes to various employees without notice or an opportunity to bargain, see *Garney Morris, Inc.*, 313 NLRB 101, 122 (1993).

The Respondent also argues that any 401(k) plan is not part of the "Flexible Benefits Plan" referred to in the Allston unit contract. The Respondent's director of benefits described the benefits books as a combined summary plan description of various benefits. He also described the Flexible Benefits Plan as a cafeteria style benefit which also goes under the name "Benefits Plus," but be asserted that the 401(k) plan was separate from the "Benefits Plus" or "Flex" plan effective April 6, 1999. He agreed, however, that as of April 1999, the Respondent had a single 401(k) program. That program (R. Exh. 2), provides as follows:

> 2.1 Eligibility for Participation
>
> (a) Eligible Employees—The following Employees shall be eligible to participate in the Plan:
>
> (i) Any Employee entitled to enroll in their Employer's Benefits Plus program; or——

Also, Respondent's witness Luman (who formerly was a senior labor relations manager for the Company), noted that he participated as either a negotiator or chief negotiator in the negotiation of both of the applicable agreements, however, the Respondent's counsel failed to ask him about the contract phrase "as described during negotiation." The failure to examine a favorable witness regarding any factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference against Respondent 'regarding any such fact,'" see *Flexsteel Industries*, 316 NLRB 745, 758 (1995). Accordingly, I conclude that the inclusion of that phrase in the contract is not shown to raise any relevant ambiguity and I therefore find that the Allston unit employees, by virtue of the contractual language referring to their coverage under the Company's Flexible Benefits Plan and the Cranston unit employees under that language and the specific inclusion of the "401(k) plan," were contractually entitled to be eligible for participation in the existing nonemployer contributory 401(k) plan.

In summation, I find that an employer who is party to an existing bargaining agreement which provides for eligibility in a 401(k) plan cannot then unilaterally exclude one subclass of its employees (here, its Local 513 unit employees covered by a collective-bargaining agreement), for not having negotiated a revised benefit while, at the same time unilaterally implementing the new benefit for other employees and simultaneously precluding the bargaining representative from negotiating on that issue.

Here, despite the existence of contractual rights to receive benefits which included voluntary participation in a 401(k) plan, the Respondent failed to notify to the Union of its planned changes and it did not offer an opportunity to bargain about them before it unilaterally implemented a new 401(k) plan that excluded unit employees from eligibility. These actions are inconsistent with the Respondent's bargaining obligation and they also have undermined the status of the Union as bargaining representative of unit employees. Accordingly, I find that the Respondent is shown to have failed to bargain in good faith and has violated Section 8(a)(1) and (5) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act and is the exclusive collective-bargaining representative of appropriate units of employees at the Employer's Allston, Massachusetts and Cranston, Rhode Island facilities.

3. By unilaterally making changes in terms and conditions of employment by changing unit employees' rights to participate in the 401(k) provisions of the Employer's Flexible Benefits Plan without giving the Union notice and the opportunity to bargain about the subject, the Respondent has violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

Having found that the Respondent failed to notify and bargain with the Union as the employees' 401(k) plan, the Respondent is ordered to bargain in good faith with the Union. In addition, the Respondent is ordered to make whole with interest, unit employees for the lost opportunity to make contributions to the matching 401(k) plan. Any additional amount the Respondent must pay shall be determined in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as computed in *New*

Horizons for the Retarded, 283 NLRB 1173 (1987).[2] The Company shall be required to preserve and make available to the Board or its agents, or request, payroll and other records to facilitate the computation of this make whole remedy.

Otherwise, it is not considered necessary that a broad order be issued.

[Recommended Order omitted from publication.]

[2] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1997 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).